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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

8 MICHAEL DEAN JONES, No. C-12-2870 EMC (pr)
9 Plaintiff,

10 || **v.** **ORDER OF SERVICE**

11 CITY AND COUNTY OF SAN
12 FRANCISCO; *et al.*,
Defendants.

ORDER OF SERVICE

16 Michael Dean Jones, an inmate at the San Francisco County Jail # 5, filed a *pro se* civil
17 rights action under 42 U.S.C. § 1983. His complaint is now before the Court for review under 28
18 U.S.C. § 1915A.

II. BACKGROUND

20 Plaintiff is an inmate at the San Francisco County Jail, although he does not state in his
21 complaint whether he is incarcerated as a pretrial detainee or following a conviction. Plaintiff
22 alleges that, on August 9, 2011, he was complaining about a correctional officer and a rule change at
23 the jail. Officer Jones allegedly heard the complaints, summoned Plaintiff to the podium, and
24 directed him to “cuff up.” Docket # 1, p. 3. Plaintiff allegedly turned around to be hand-cuffed and
25 laid across a table. Officer Jones allegedly pulled Plaintiff off the table and “ran [plaintiff] into the
26 podium.” *Id.* Officer Jones allegedly then pulled Plaintiff from the podium, kicked Plaintiff’s feet
27 out from under him and slammed him into the floor.

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III. DISCUSSION

2 A federal court must engage in a preliminary screening of any case in which a prisoner seeks
3 redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C.
4 § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims
5 which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek
6 monetary relief from a defendant who is immune from such relief. *See id.* at § 1915A(b). *Pro*
7 *se* pleadings must be liberally construed. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699
8 (9th Cir. 1990).

9 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a right
10 secured by the Constitution or laws of the United States was violated and (2) that the violation was
11 committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48
12 (1988).

13 The Due Process Clause of the Fourteenth Amendment protects a pretrial detainee from the
14 use of force that amounts to punishment. *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) (citing
15 *Bell v. Wolfish*, 441 U.S. 520, 535-39 (1979)). The Eighth Amendment’s prohibition of cruel and
16 unusual punishments protects a convict from force used maliciously and sadistically for the very
17 purpose of causing harm. *See generally Hudson v. McMillian*, 503 U.S. 1, 6 (1992). Liberally
18 construed, the complaint states a § 1983 claim against defendant officer Jones for excessive force,
19 regardless of whether the claim arises under the Eighth or Fourteenth Amendment.

20 The complaint lists officer Gonzalez and sergeant Kesslier as additional individual
21 defendants, but contains no allegations against them. Officer Gonzales and sergeant Kesslier are
22 DISMISSED because neither of them is alleged to have participated in the use of force or otherwise
23 caused any violation of Plaintiff's constitutional rights. *See Leer v. Murphy*, 844 F.2d 628, 633-34
24 (9th Cir. 1988).

25 The complaint also lists the City and County of San Francisco as a Defendant, but contains
26 no allegations against this Defendant. It appears that Plaintiff has named the City on a theory of
27 respondeat superior. A city or county may not be held vicariously liable under § 1983 for the
28 unconstitutional acts of its employees under the theory of respondeat superior. *See Board of Cty.*

1 *Comm’rs. of Bryan Cty. v. Brown*, 520 U.S. 397, 403 (1997). Local governments are “persons”
2 subject to liability under 42 U.S.C. § 1983 where official policy or custom causes a constitutional
3 tort, *see Monell v. Dep’t of Social Servs.*, 436 U.S. 658, 690 (1978). To impose municipal liability
4 under § 1983 for a violation of constitutional rights, a plaintiff must show: (1) that the plaintiff
5 possessed a constitutional right of which he or she was deprived; (2) that the municipality had a
6 policy; (3) that this policy amounts to deliberate indifference to the plaintiff’s constitutional rights;
7 and (4) that the policy is the moving force behind the constitutional violation. *See Plumeau v.*
8 *School Dist. #40 County of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997). Plaintiff has not made any
9 such allegations. The municipal defendant is DISMISSED without prejudice to Plaintiff alleging a
10 *Monell* claim against the municipal defendant.

11 IV. CONCLUSION

12 1. The complaint states a cognizable § 1983 claim against officer Jones for excessive
13 force. All other Defendants and claims are dismissed.
14 2. The Clerk shall issue a summons and the United States Marshal shall serve, without
15 prepayment of fees, the summons, a copy of the complaint and a copy of all the documents in the
16 case file upon San Francisco Sheriff’s officer Jones, who apparently is employed at the San
17 Francisco County Jail # 5.
18 3. In order to expedite the resolution of this case, the following briefing schedule for
19 dispositive motions is set:
20 a. No later than **January 18, 2013**, Defendant must file and serve a motion for
21 summary judgment or other dispositive motion. If Defendant is of the opinion that this case cannot
22 be resolved by summary judgment, Defendant must so inform the Court prior to the date the motion
23 is due. If Defendant files a motion for summary judgment, Defendant must provide to Plaintiff a
24 new *Rand* notice regarding summary judgment procedures at the time he files such a motion.
25 *See Woods v. Carey*, 684 F.3d 934, 939 (9th Cir. 2012). If Defendant files a motion to dismiss for
26 non-exhaustion of administrative remedies, Defendant must provide to Plaintiff a notice regarding
27 motions to dismiss for non-exhaustion procedures at the time he files such a motion. *See Stratton v.*
28 *Buck*, No. 10-35656, slip op. 11477, 11483 (9th Cir. Sept. 19, 2012).

1 b. Plaintiff's opposition to the summary judgment or other dispositive motion
2 must be filed with the Court and served upon Defendant no later than **February 15, 2013**. Plaintiff
3 must bear in mind the notice and warning regarding summary judgment provided later in this order
4 as he prepares his opposition to any motion for summary judgment. Plaintiff also must bear in mind
5 the notice and warning regarding motions to dismiss for non-exhaustion provided later in this order
6 as he prepares his opposition to any motion to dismiss.

7 c. If Defendant wishes to file a reply brief, the reply brief must be filed and
8 served no later than **March 1, 2013**.

9 4. Plaintiff is provided the following notices and warnings about the procedures for
10 motions for summary judgment and motions to dismiss for non-exhaustion of administrative
11 remedies:

12 The defendants may make a motion for summary judgment by which
13 they seek to have your case dismissed. A motion for summary
14 judgment under Rule 56 of the Federal Rules of Civil Procedure will,
15 if granted, end your case. . . . Rule 56 tells you what you must do in
16 order to oppose a motion for summary judgment. Generally, summary
17 judgment must be granted when there is no genuine issue of material
18 fact -- that is, if there is no real dispute about any fact that would
19 affect the result of your case, the party who asked for summary
20 judgment is entitled to judgment as a matter of law, which will end
21 your case. When a party you are suing makes a motion for summary
22 judgment that is properly supported by declarations (or other sworn
testimony), you cannot simply rely on what your complaint says.
Instead, you must set out specific facts in declarations, depositions,
answers to interrogatories, or authenticated documents, as provided in
Rule 56(e), that contradict the facts shown in the defendants'
declarations and documents and show that there is a genuine issue of
material fact for trial. If you do not submit your own evidence in
opposition, summary judgment, if appropriate, may be entered against
you. If summary judgment is granted, your case will be dismissed and
there will be no trial. *Rand v. Rowland*, 154 F.3d 952, 962-63 (9th
Cir. 1998).

23 The defendants may file a motion to dismiss for failure to exhaust
24 administrative remedies instead of, or in addition to, a motion for
25 summary judgment. A motion to dismiss for failure to exhaust
26 administrative remedies is similar to a motion for summary judgment
in that the court will consider materials beyond the pleadings. You
27 have the right to present any evidence you may have which tends to
show that you did exhaust your administrative remedies or were
excused from doing so. The evidence may be in the form of
declarations (that is, statements of fact signed under penalty of
perjury) or authenticated documents (that is, documents accompanied
by a declaration showing where they came from and why they are

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1 authentic), or discovery documents such as answers to interrogatories
2 or depositions. In considering a motion to dismiss for failure to
3 exhaust, the court can decide disputed issues of fact with regard to this
4 portion of the case. If defendants file a motion to dismiss and it is
5 granted, your case will be dismissed and there will be no trial. *See generally Stratton v. Buck*, slip op. at 11483-84.

5 5. All communications by Plaintiff with the Court must be served on a Defendant's
6 counsel by mailing a true copy of the document to Defendant's counsel. The Court may disregard
7 any document which a party files but fails to send a copy of to his opponent. Until a Defendant's
8 counsel has been designated, Plaintiff may mail a true copy of the document directly to Defendant,
9 but once a Defendant is represented by counsel, all documents must be mailed to counsel rather than
10 directly to that Defendant.

11 6. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No
12 further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16 is required
13 before the parties may conduct discovery.

14 7. Plaintiff is responsible for prosecuting this case. Plaintiff must promptly keep the
15 Court informed of any change of address and must comply with the Court's orders in a timely
16 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant
17 to Federal Rule of Civil Procedure 41(b). Plaintiff must file a notice of change of address in every
18 pending case every time he is moved to a new facility.

19 8. Plaintiff is cautioned that he must include the case name and case number for this
20 case on any document he submits to this Court for consideration in this case.

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22 IT IS SO ORDERED.

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24 Dated: November 6, 2012

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26 EDWARD M. CHEN
27 United States District Judge
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